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CASE NO. A21-660

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IN THE NEBRASKA COURT OF APPEALS

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STATE OF NEBRASKA, Plaintiff/Appellee,

v.

EIGHTEEN THOUSAND DOLLARS U.S. CURRENCY, Defendant

CHRISTOPHER BOULDIN, Appellant

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ON APPEAL FROM THE DISRICT COURT OF SEWARD COUNTY,

NEBRASKA

THE HONORABLE JAMES STECKER PRESIDING

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APPELLEE'S BRIEF

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Prepared and Submitted by:

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### BASIS FOR APPELLATE JURISDICTION

Appellant Christopher Bouldin appeals from the Seward County District Court's July 14, 2021, order forfeiting \$18,000 in U.S. currency pursuant to Neb. Rev. Stat. 28-431 (Reissue 2016) in this case. "A judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record." Neb. Rev. Stat. §25-1911 (Reissue 2016). A final order includes "[a]n order affecting a substantial right in an action, when such order in effect determined the action and prevents a judgment." Neb. Rev. Stat. §25-1902(1)(a) (Reissue 2016). The District Court order determined the action in this case.

- a. Date of entry of the judgment or order sought to be reviewed: Appellee accepts Appellant's statement as correct;
- b. The date of filing of any motion claimed to toll the time within which to appeal: Appellee accepts Appellant's statement as correct;
- c. The date of filing of the notice of appeal and the date of the depositing of the docket fee: Notice of Appeal was filed on August 6, 2021, and the docket fee was paid on August 12, 2021;
- d. Appellee accepts Appellant's statement this is not an interlocutory appeal.

### STATEMENT OF THE CASE

Appellee accepts Appellant's statement of the case as correct.

## PROPOSITIONS OF LAW

### I.

Regarding questions of law, an appellate Court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. One Thousand Nine Hundred Forty-Seven Dollars in U.S. Currency*, 255 Neb. 290, 292 (1998).

### II.

The standard of proof in a forfeiture proceeding filed pursuant to §28-431 is clear and convincing evidence. Neb. Rev. Stat. §28-431(6).

### III.

The appellate standard of review for sufficiency of evidence to support a forfeiture of money is the standard of review used in criminal cases. *State v. Three Thousand Sixty Seven Dollars and Sixty-Five Cents (\$3,067.65)*, 4 Neb. App. 443, 449-450 (1996).

### IV.

In determining whether evidence is sufficient to sustain a conviction in a bench trial of a criminal case, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, all of which are within a fact finder's province for disposition. The trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous. *State v. Three Thousand Sixty Seven Dollars and Sixty-Five Cents (\$3,067.65)*, 4 Neb. App. 443, 450 (1996).

### V.

In a forfeiture case pursuant to Neb. Rev. Stat. 28-431, when there is both circumstantial and direct evidence, the circumstantial evidence is to be treated the same as direct evidence, and upon review, the State is entitled to have all conflicting evidence, both direct and circumstantial, and all reasonable inferences which can be drawn therefrom, viewed in its favor. *State v. Three Thousand Sixty Seven Dollars and Sixty-Five Cents (\$3,067.65)*, 4 Neb. App. 443, 451 (1996).

## VI.

If a claimant proves by a preponderance of the evidence that he or she (a) has not used or intended to use the property to facilitate an offense in violation of the Uniform Controlled Substances Act, (b) has an interest in such property as owner or lienor or otherwise, acquired by him or her in good faith, and (c) at no time had any actual knowledge that such property was being or would be used in, or to facilitate, the violation of the act, the court shall order that such property or the value of the claimant's interest in such property be returned to the claimant. Neb. Rev. Stat. 28-431(6). See also *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 341-342 (1995).

## VII.

Clear and convincing evidence is “that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.” *State v. Payne-McCoy*, 284 Neb. 302 (2012).

## STATEMENTS OF THE FACTS

On August 7, 2020, the State of Nebraska filed a Petition for Disposition of Seized Property pursuant to Neb. Rev. Stat. §28-431 (Reissue 2016) seeking forfeiture of \$18,000.00 in United States currency pursuant to §28-431 and Neb. Rev. Stat. §28-1439.02 (Reissue 2016). The petition alleged that on August 1, 2020, Deputy Chase Parmer of the Seward County Sheriff's Office seized \$18,000.00 in United States currency as evidence. The petition further alleged that Appellant, Christopher Bouldin, was in possession of the currency at the time of the seizure and that the currency was used, or intended to be used, to facilitate a violation of the Uniform Controlled Substances Act. (T1-2).

A voluntary appearance by Appellant was filed on November 12, 2020, and on December 7, 2020, Appellant filed a claim to the \$18,000.00 which was the subject of the petition. (T8, 9).

Trial was held before the Seward County District Court on July 14, 2021. Deputy Chase Parmer of the Seward County Sheriff's Office testified. Deputy Parmer was assigned to the Criminal Interdiction Task Force. (6:22-24). Prior his position as a Seward County Deputy, Parmer was a police officer with the Seward Police Department. (7:10-11). Parmer has attended criminal interdiction courses and received on the job training from other people experienced in criminal interdiction. (7:22-8:11).

Parmer testified that on August 1, 2020, he performed a traffic stop of a westbound rental vehicle in Seward County, Nebraska, for following a tractor-trailer too closely and driving on the shoulder. (9:1-13; 12:11-14). The driver of the rental, a minivan, was the sole occupant of the vehicle. (10:9-17). When Parmer approached the vehicle, he noted there was a radar detector, a dog, and a cooler with several beverages in the vehicle. (11:2-6). Parmer testified that he made note of these items for the following reasons: radar detectors are commonly used for drivers to avoid contact with law enforcement; dogs are often used to disrupt a canine sniff of a vehicle; and the beverages and cooler indicate that the driver may be eating and drinking on the road rather than stopping during the trip. (11:9-16).

The driver was identified as Christopher Bouldin, the appellant, who provided a Virginia driver's license. (11:21-23). Appellant also informed Parmer that he was traveling to Denver, Colorado. (12:6-8). Parmer had Appellant accompany him to his patrol car to process a written warning for the traffic

violations. (12:23-13). While at the patrol car, Parmer learned from dispatch that Appellant had a criminal history, including drug offenses. (13:20-22).

A certified copy of a conviction for Appellant from the State of Utah was received into evidence at trial which shows that Appellant was convicted of Attempted Possession of a Controlled Substance with Intent to Distribute in 2016. (E1). The Statement of Probable Cause for that conviction indicates that Appellant was contacted in a rental car for speeding and was found to be in possession of twelve pounds of marijuana. (E1, p. 4).

Appellant informed Parmer that he was not currently working due to Covid. (13:23-14:5). While at the patrol car, Appellant told Parmer he was traveling alone to Ft. Collins, Colorado, to hike and “get away.” (14:9-16). Appellant also seemed to be very educated about marijuana legalization. (16:19-17:5).

Deputy Parmer decided to detain Appellant based on reasonable suspicion that a crime was occurring. (17:6-9). Parmer requested consent to search the vehicle and Appellant denied the request. (19:5-10).

Deputy Goplin of the York County Sheriff’s Office arrived to assist. Goplin conducted a search around the vehicle with his certified canine which gave a positive indication to the presence of illegal narcotics. (20:14-22).

A search of the vehicle was conducted. (21:1-3). Deputy Parmer located a backpack that contained a vacuum sealer, two unopened boxes of vacuum seal bags and a disinfectant spray bottle. Deputies also located a sleeping bag which was zipped shut. Inside the sleeping bag, they located a plastic bag containing six bundles of U.S. currency. (21:7-13). They located food and beverages in the cooler. (21:15-18).

When asked, Appellant told Parmer that he was going to use the vacuum seal bags to keep his food fresh when he arrived in Colorado and that the currency (\$18,000) was his earnings. (22:4-11).

Appellant gave the deputies consent to review the contents of his cell phone. (24:7-14).

Subsequent investigation revealed that Appellant had rented vehicles in Richmond, Virginia, through Enterprise Rental on two prior occasions. Records showed he traveled approximately the same number of miles as a round trip from Richmond, Virginia, to Ft. Collins, Colorado, and in the same time frame as the current rental was intended. (24:15-25:3; E2). Appellant also admitted to previously traveling to the Denver, Colorado area before. (25:17-20).

The U.S. currency was seized by Deputy Parmer and totaled \$18,000.00. (36:18-37:3).

Deputy Parmer testified that based on his training and experience and his observations that day, Appellant intended to purchase a large amount of marijuana in Colorado with the U.S. currency and then return it to Virginia to distribute. (40:8-25).

The Appellant did not appear at trial and did not present any evidence on his behalf.

Following trial, the Seward County District Court found by clear and convincing evidence that the \$18,000.00 in United States currency that was seized on August 1, 2020, was “used, or intended to be used, to facilitate a violation of the Uniform Controlled Substances Act” and declared the currency to be a common nuisance, forfeiting it to the State of Nebraska for distribution according to Nebraska statutes. (43:2-8; T15-16).

Appellant appeals the District Court's findings.

## ARGUMENT

### I. THE TRIAL COURT APPLIED THE CORRECT STANDARD OF PROOF OF CLEAR AND CONVINCING EVIDENCE FOR THE FORFEITURE PROCEEDING PURSUANT TO NEB. REV. STAT. §28-431 (REISSUE 2016).

In his argument, Appellant misstates the burden of proof in a forfeiture proceeding filed pursuant to Neb. Rev. Stat. §28-431 by relying on statutory language that was no longer in effect at the time of the trial in this case. Because this issue is a question of law, this Court is “obligated to reach a conclusion independent of determinations reached by the trial court.” *State v. One Thousand Nine Hundred Forty-Seven Dollars in U.S. Currency*, 255 Neb. 290, 292 (1998).

The correct standard of proof in a forfeiture proceeding filed pursuant to §28-431 is clear and convincing evidence. Subsection (6) of §28-431 provides:

If there are no claims, if all claims are denied, or if the value of the property exceeds all claims granted and **it is shown by clear and convincing evidence that such property was used in violation of the act**, the court shall order disposition of such property at such time as the property is no longer required as evidence in any criminal proceeding.

Neb. Rev. Stat. §28-431(6) (Reissue 2016) (emphasis supplied).

In 2016, the Nebraska Legislature amended §28-431 and modified the burden of proof in a forfeiture proceeding pursuant to that statute from “beyond a reasonable doubt” to “by clear and convincing evidence.” 2016 LB1106 § 6 (effective July 21, 2016). Appellant cites several cases for the proposition that the burden of proof in this case is “beyond a reasonable doubt,” including *State v. 1987 Jeep Wagoneer VIN 1JCMT7543HT161853*, 241 Neb. 397 (1992) and *State v. Franco*, 257 Neb. 15 (1999). These cases were decided prior to the 2016 legislative amendment and correctly stated that burden of proof **as it was enumerated in the statute at those times**.

The Nebraska Supreme Court recognized the Nebraska Legislature’s ability to modify the burden of proof for a forfeiture case pursuant to §28-431 in *State v. Franco* when it considered Franco’s double jeopardy claim. The Court noted

Thus, the State must show beyond a reasonable doubt that the property seized was in violation of chapter 28, article 4. This indicates the Legislature intended that §28-431 should be considered criminal in nature. ...The Legislature, having not attempted to modify the forfeiture proceeding under chapter 28, article 4, has acquiesced in our determination that the actions pursuant to 28-431 are criminal proceedings. In the absence of a legislative amendment to §28-431, we cannot now say that the Legislature's intent has changed.

*Franco* at 23.

As a result, the trial court in this case correctly applied the clear and convincing standard of proof which was amended by the Nebraska Legislature from beyond a reasonable doubt in 2016.

## II. THERE WAS SUFFICIENT EVIDENCE PRESENTED IN THIS CASE FOR THE TRIAL COURT TO ENTER AN ORDER OF FORFEITURE PURSUANT TO NEB. REV. STAT. §28-431 (REISSUE 2016).

The evidence presented at trial proved by clear and convincing evidence that the \$18,000 in U.S. currency seized in this case was used, or intended to be used, to facilitate a violation of the Uniform Controlled Substances Act. As a result, the trial court properly entered an order of forfeiture pursuant to Neb. Rev. Stat. §28-431.

The appellate standard of review for sufficiency of evidence to support a forfeiture of money is the standard of review used in criminal cases. *State v. Three Thousand Sixty Seven Dollars and Sixty-Five Cents (\$3,067.65)*, 4 Neb. App. 443, 449-450 (1996).

In determining whether evidence is sufficient to sustain a conviction in a bench trial of a criminal case, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, all of which are within a fact finder's province for disposition. *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995); *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994); *State v.*

*Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993). The trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous. *State v. Simants*, 248 Neb. 581, 537 N.W.2d 346 (1995); *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994).

In this case, the evidence is both direct and circumstantial. In a §28-431 forfeiture case, when there is both circumstantial and direct evidence, the circumstantial evidence is to be treated the same as direct evidence, and upon review, the State is entitled to have all conflicting evidence, both direct and circumstantial, and all reasonable inferences which can be drawn therefrom, viewed in its favor. [*State v.*] *One 1985 Mercedes 190D Automobile*, [247 Neb. 335 (1995)]; [*State v.*] *1987 Jeep Wagoneer*, [241 Neb. 397 (1992)].

*Id.* at 450-451.

As a preliminary matter, the State notes that on December 7, 2020, Appellant filed an answer/claim to the currency with the Clerk of the Seward County District Court. (T9). Neb. Rev. Stat. §28-431(6) provides that any person having an interest in the currency may file an answer to the petition which “shall allege the claimant’s interest in or liability involving such property.”

Appellant’s answer simply stated in pertinent part that he was “making claim of the 18,000\$ [sic] that was taken from me during a traffic stop on Aug 1<sup>st</sup> 2020 by Sheriff Deputy Chase Pharmer [sic].” (T9). Appellant did not allege his interest in or liability involving the currency. As a result, he did not properly respond to the Petition filed in this case.

To the extent the Court views his answer as proper, the State also notes that Appellant did not appear at the trial in this matter and failed to present evidence on his behalf. (4:6-9). In order to have the currency returned to him, §28-431(6) required him to prove

by a preponderance of the evidence that he or she (a) has not used or intended to use the property to facilitate an offense in violation of the act, (b) has an interest in such property as owner or lienor or otherwise, acquired by him or her in good faith, and (c) at no time had any actual knowledge that such property was being or would be used in, or to facilitate, the violation of the act...

*State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 341-342 (1995). Because Appellant did not present evidence in support of his answer/claim, he did not meet his burden of proof required for the trial court to order the currency to be returned to him.

The next question is whether the State of Nebraska proved by clear and convincing evidence that the currency was used, or intended to be used, to facilitate a violation of the Uniform Controlled Substances Act. Neb. Rev. Stat. §28-431(6).

Clear and convincing evidence is “that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.” *State v. Payne-McCoy*, 284 Neb. 302 (2012).

The State of Nebraska met its burden of proof in this case. Deputy Chase Parmer testified at trial. When Parmer approached the rental vehicle driven by Appellant on August 1, 2020, he noted there was a radar detector, a dog, and a cooler with several beverages in the vehicle. (11:2-6). Parmer testified that he made note of these items for the following reasons: radar detectors are commonly used for drivers to avoid contact with law enforcement; dogs are often used to disrupt a canine sniff of a vehicle; and the beverages and cooler indicate that the driver may be eating and drinking on the road rather than stopping during the trip. (11:9-16; 21:15-23; 27:6-16). Parmer further testified that people transporting currency will often travel with food and beverages so they do not have to leave the currency unattended in the car. (17:17-24). Parmer also noted during his contact that the dog with Appellant was a “very elder dog” and “could barely walk.” It did not appear to be a hiking dog. (18:8-11).

Appellant appeared to Deputy Parmer to be very educated about marijuana legalization. (16:19-17:5). Appellant was also convicted of Attempted Possession of a Controlled Substance with Intent to Distribute in the State of Utah in 2016. (E1). The Statement of Probable Cause for that conviction indicates that Appellant was contacted in a rental car for speeding and was found to be in possession of twelve pounds of marijuana. (E1, p. 4). Parmer testified that Appellant attempted to minimize the conviction by stating he had only been caught with less than “half an ounce of marijuana.” (39:8-17).

Appellant initially told Parmer that he was traveling to Denver, Colorado, and later said that he was traveling to Ft. Collins, Colorado, for his trip. (14:6-13). Parmer testified that both locations are major city areas that are “known for

having a lot of dispensary marijuana and bulk marijuana in those locations. (15:12-14).

The rental vehicle Appellant was driving had been rented for a period of about one week. (15:24-25). Subsequent investigation revealed that Appellant had rented vehicles in Richmond, Virginia, through Enterprise Rental on two prior occasions. Records showed he traveled approximately the same number of miles as a round trip from Richmond, Virginia, to Ft. Collins, Colorado, and in the same time frame as the current rental was intended. (24:15-25:3; E2). Appellant also admitted to previously traveling to the Denver, Colorado area. (25:17-20).

Deputy Parmer located a backpack that contained a vacuum sealer, two unopened boxes of vacuum seal bags and a disinfectant spray bottle. Deputies also located a sleeping bag which was zipped shut. Inside the sleeping bag, they located a plastic bag containing six bundles of U.S. currency. (21:7-13). They located food and beverages in the cooler. (21:15-18).

When asked, Appellant told Parmer that he was going to use the vacuum seal bags to keep his food fresh when he arrived in Colorado and that the currency (\$18,000) was his earnings. (22:4-11).

Parmer testified that based on his training and experience, people who pick up a large amount of marijuana will put it in vacuum sealed bags to make more space and to make it harder to smell the marijuana. (22:15-24). Parmer also testified that the vacuum sealer appeared to have a "faint" amount of marijuana residue on it. (36:7-11).

Parmer testified that disinfectant spray is another tool to cover the odor of marijuana. (23:1-2).

The currency located in the zipped sleeping bag was bundled in a way that was consistent with the way law enforcement often sees illegal currency-- not in a bank envelope, no bank receipts, largely in \$20 bills, and not banded, faced, and oriented as if withdrawn from a bank. (23:3-24:2; E3, p.7-8).

Exhibit 4 contained photographs taken by Deputy Parmer of information he found on Appellant's phone. (29:19-24; 35:13). Appellant's phone contained photographs of marijuana which were documented through photographs by Parmer. (30:8-23; E4, pp. 1-2). The phone's call log showed phone calls to Colorado telephone numbers. That was significant to Parmer because he also located text messages communicating with one of the Colorado phone numbers regarding a large amount of illegal narcotics. (32:3-11). It was also significant to

Parmer that while many of the phone numbers in the phone's contact list had names associated with them, this one did not. He testified that this is done in order to protect the names of the parties involved in illegal drug transactions. (33:24-34:5). Parmer located text messages that appeared to be regarding a drug transaction. (34:6-35:10).

Finally, Deputy Parmer testified that a D40 drug detection kit was used on the currency that was seized. The test kit showed a positive test for marijuana indicating that the currency had likely been touched by someone who had also touched marijuana within approximately 60 hours prior to the test. (41:4-15).

Deputy Parmer testified that based on his training and experience, his observations on August 1, 2020, and his further investigation, it was his opinion that Appellant intended to use the \$18,000 in U.S. currency seized in this case to purchase marijuana in Colorado and to return it to another location for distribution. (40:8-25).

As provided in Neb. Rev. Stat. §28-416(1) (Reissue 2016) of the Uniform Controlled Substances Act, it is unlawful "for any person knowingly or intentionally: (a) To manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance..." Marijuana is a Schedule I controlled substance. Neb. Rev. Stat. §28-405 (Reissue 2016).

Based on the evidence presented at trial, the State proved by clear and convincing evidence that the \$18,000 thousand dollars in U.S. currency seized in this case was used, or intended to be used, to facilitate a violation of the Uniform Controlled Substances Act. As a result, the trial court findings were not clearly erroneous and the Court properly entered an order of forfeiture pursuant to Neb. Rev. Stat. §28-431.

## CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm the July 14, 2021, order that the \$18,000 in U.S. currency seized in this case be forfeited pursuant to Neb. Rev. Stat. §28-431.

Respectfully Submitted,

/s/ Lory A. Pasold

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# Certificate of Service

I hereby certify that on Friday, January 28, 2022 I provided a true and correct copy of this *Brief of Appellee State* to the following:

Christopher Bouldin represented by Bradley Andrew Sipp (23970) service method: Electronic Service to **bsipp@windstream.net**

Signature: /s/ Lory A. Pasold (20467)